

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-1430

SPENCER HARDNEY,

Appellant,

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee

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TABLE OF CONTENTS

APPELLANT’S REPLY ARGUMENT.....	1
The Board committed prejudicial legal error when it determined that the Veteran’s 20 percent rating for diabetes prior to March 2009 adequately contemplated the severity of his condition.....	1
CONCLUSION	3

TABLE OF AUTHORITIES

Cases

<i>Dennis v. Nicholson</i> , 21 Vet.App. 18 (2007).....	2
<i>Johnson v. McDonald</i> , 762 F. 3d 1362 (Fed. Cir. 2014).....	2
<i>MacWhorter v. Derwinski</i> , 2 Vet.App. 133 (1992).....	2
<i>Yancy v. McDonald</i> , 27 Vet.App. 484 (2016).....	2
<i>Thun v. Peake</i> , 22 Vet.App. 111 (2008).....	2

Regulations

38 C.F.R. § 4.119 (2015).....	1
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Record Before the Agency (“R”) Citations

R-1-14 (March 2015 Board decision).....	1
R-706-10 (October 2011 VA examination).....	1, 3
R-854-56 (May 2008 co-workers lay statements).....	3
R-869 (December 2007 MD letter).....	1, 3

APPELLANT'S REPLY ARGUMENT

The Board committed prejudicial legal error when it failed to compare the Veteran's manifestations and level of severity of his diabetes to those contemplated by a 20 percent rating under the schedular criteria.

Diagnostic code 7913 provides a 20 percent rating when a veteran suffers from diabetes treated with insulin and a restricted diet. 38 C.F.R. § 4.119 (2015). That diagnostic code is silent regarding hypoglycemic episodes during which the veteran suffers confusion, personality change, blurred vision, motor weakness, sweating, and abnormal heart rating. *See id.*; *see also* R-710; R-869. Despite the fact that Mr. Hardney suffered from these manifestations, which are not specifically contemplated by his assigned 20 percent rating, the Board inexplicably found “[t]he schedular criteria adequately describe the Veteran’s symptoms.” R-13.

The Secretary finds this argument “unavailing.” Sec. Brief at 9. He notes that the Board determined the Rating Schedule “specifically, discussed hypoglycemic reactions, but requires that they result in hospitalization.” *Id.* at 10. This argument fails to appreciate the difference between schedular and extraschedular ratings. The fact that the Veteran does not meet the requirement for a higher schedular rating does not *per se* establish that the severity of his condition is adequately compensated. The very purpose of extraschedular referral to account for situations in which a veteran does not meet the higher schedular criteria but is nonetheless inadequately

compensated. *See Johnson v. McDonald*, 762 F. 3d 1362, 1366 (Fed. Cir. 2014) (holding that section 3.321(b)(1) performs a “gap-filling function.”).

The Board must compare “the level of severity and symptomatology of the claimant’s service-connected disability with the established criteria.” *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). More recently, in *Yancy v. McDonald*, this Court reiterated that “the Board first must compare the veteran’s symptoms with the *assigned* schedular ratings.” 27 Vet.App. 484, 495 (2016) (emphasis added). However, at no point in the Board’s brief conclusion did it compare the Veteran’s symptoms or the severity of those symptoms to those contemplated by his 20 percent rating. Simply saying that schedular criteria contemplate the Veteran’s symptoms does not make it so. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007).

The Secretary merely reiterates the Board’s inadequate analysis when he states, “it is clear that Appellant’s symptoms, and the severity of those symptoms, fell within the available rating criteria.” Sec. Brief at 10. Moreover, the Secretary fails to provide any discernible response to the Veteran’s argument regarding the Board’s analysis of prong two of *Thun*. *See* Apa. Open Brief at 10-12; Sec. Brief at 10-11; *see also MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (“[T]he Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded.”).

CONCLUSION

During the time period on appeal, Mr. Hardney suffered from hypoglycemic attacks that manifested in confusion, personality change, blurry vision, motor weakness, sweating, and tachycardia. R-869. These symptoms are not contemplated by his 20 percent rating. Additionally, these symptoms interfered with his job to the extent that he has to take breaks. R-854-86. His coworkers also had to come to his aid to treat these attacks. R-710. The Board erred when it failed to explain why these symptoms and the severity of Mr. Hardney's condition did not warrant extraschedular referral.

For the foregoing reasons, along with those presented in his opening brief, Mr. Hardney respectfully requests that the Board's decision be vacated and his appeal remanded so that it may properly adjudicate his entitlement to extraschedular consideration for the time period prior to March 2009.

Respectfully submitted,

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